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No. 492

IN THE

Supreme Court of the United States

October Term, 1968

CLARENCE BRANDENBERG,
Appellant,

vs.

PEOPLE OF THE STATE OF OHIO,
Appellees.

BRIEF OF AMICUS CURIAE

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On Appeal from the Supreme Court of the State of Ohio

BRIEF OF AMICUS CURIAE

ISSUES PRESENTED

I.

Section 2923.13, Ohio Revised Code Is Not Unconstitutional, Either On Its Face Or As Applied In This Case.

II.

Section 2923.13, Ohio Revised Code Prohibiting Criminal Syndicalism Has Not Been Preempted By Federal Legislation.

STATEMENT OF THE CASE

This amicus curiae brief is submitted at the request of the Court.

The Attorney General of Ohio took no part in the indictment or trial of appellant in this case and is completely unfamiliar with the facts and circumstances thereof other than as they appear in the record filed in this Court. This record appears to support the statement submitted by appellant in his brief. In addition to this statement, it is deemed pertinent to note that the record shows that the announcer-reporter who testified that he had received a telephone invitation from an unknown party to appear at the subject rally (A.8, 12) testified that he subsequently recognized the voice of appellant as the same as that of the person who had invited him to the rally and also the same as that of the person who wore the red hood at the rally (A.12-15, 19, 25-26).

It further is noted that the record which purports to contain the trial judge's charge to the jury, contains no requests of appellant's counsel for additional or clarifying instructions or any objection to those which were given. Certainly a denial of such requests should have been the subject of a motion for a new trial but appear not to have been (A.5-6).

The Attorney General of Ohio confines his brief to the questions of the constitutionality of the subject statute and preemption by the United States through the Smith Act.

ARGUMENT

I.

Section 2923.13, Ohio Revised Code Is Not Unconstitutional, Either On Its Face Or As Applied In This Case.

Section 2923.13, Ohio Revised Code,[1] advocating criminal syndicalism, divided into sections reads as follows:

> 1. No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.
>
> 2. No person shall print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism.
>
> 3. No person shall openly, wilfully, or deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism.
>
> 4. No person shall organize or help to organize or become a member of, or voluntarily assemble with any

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[1] Ohio Revised Code 2923.13. *Advocating criminal syndicalism.*

No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully, or deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Only two sections of the statute are applicable in this case.

The pertinent part of count one of the indictment provides: ". . . did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform . . ." The pertinent part of the second count of the indictment provides: ". . . did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism [a doctrine which advocates crime; sabotage, which is defined as malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform] . . ." Specifically, these counts of the indictment fall within the scope of parts (1) and (4) of the statute.

Section 2923.12, Ohio Revised Code[2] defines Criminal Syndicalism, ". . . 'criminal syndicalism' is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform." There can be no question concerning the intent of the Ohio Legislature in the type of activity that was proscribed in accomplishing any industrial or political reform, and this section by direct reference, applies the definition of criminal syndicalism to Section 2923.13, the section under which appellant was charged. There is no vagueness, therefore, in the descrip-

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[2] Ohio Revised Code 2923.12. *Criminal Syndicalism.*

As used in Sections 2923.13 to 2923.15 inclusive, of the Revised Code, "criminal syndicalism" is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform.

tion of the acts proscribed by the legislature.

The intention of the legislature in enacting these sections was not to interfere with the teaching or advocacy of accomplishing industrial or political reform but rather to insure that such reform could not be accomplished through the advocacy or teaching the duty of the necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism.

Certainly a state legislature has the right to enact legislation which will prevent the use of violence, commission of crime, sabotage, and unlawful methods of terrorism in bringing about either political or industrial reform. Mr. Chief Justice Vinson, speaking for the majority of the Court, in referring to the Smith Act, 18 U.S.C., Section 10, stated:

> "The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the *power* of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion . . . No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the government by force and violence. The question with which we are concerned here is not whether Congress has such *power,* but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution." *Dennis v. United States,* 341 U.S. 494, 501 (1951).

In Dennis the sub-sections under consideration were not greatly different in their application from those of Section 2923.13 Ohio Revised Code. In Dennis, the proscribed acts dealt with the overthrow or destruction of any government in the United States by force or violence or with the intent to cause such overthrow, to advocate or teach the duty, necessity, desirability or propriety of force or violence.

Subsection 3, paragraph 10 of the Smith Act is almost identical with part (4) of the Ohio Act except that the Ohio Act bars the unlawful acts in accomplishing political or industrial reform rather than the overthrow or destruction of government.

Appellant contends that Section 2923.13 Ohio Revised Code, violates the First and Fourteenth Amendments to the Constitution of the United States. He bases this argument on the fact that the liberal wording of the Ohio Criminal Syndicalism Act fails to draw the necessary constitutional distinction between "advocacy of abstract doctrine and advocacy directed at promoting unlawful action."

In the Ohio statute there is no wording by which the advocacy or teaching of an abstract doctrine could be implied. The statute, as applied to the indictment herein, only can be construed in one way, namely that of advocating (or teaching) the duty, the necessity, the propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. The very language used here negates the interpretation which appellant would have placed upon the statute. This wording is directed at taking action, not discussion, as appellant would have us believe.

And even as charged by the trial court no such construction could be implied. The charge of the court must be taken in its entirety, not by definitions taken out of context, in explaining the meaning of the terminology contained in the elements of the first count of the indictment.

> "To advocate means to speak in favor of; defend by argument; to support, vindicate, or recommend publicly.
>
> "Unlawful method of terrorism is the use of terror and violence to intimidate, to subjugate, etc., when the methods used to accomplish such intimidation or subjugation are against the law.

"Political reform as used in Ohio law refers to remodeling or changing the policy or the administration of government.

"Violence is the unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury.

"Crime is a violation of, or a neglect to perform, a legal duty of such importance to the protection of society that the state takes notice thereof and imposes a penalty or punishment for such violation or neglect. In Ohio, no act is a crime unless specifically defined by the legislature and a penalty provided for the violation thereof." (A 77-78).

Thus, the meaning of advocacy, as defined by the court, is that to advocate means to speak in favor of or to defend by argument or to support, vindicate or recommend publicly the use of terror and violence to intimidate, subjugate, etc., when the methods to accomplish such intimidation or subjugation are against the law. There is nothing in this definition that proscribes the pursuit of peaceful studies and discussions or teaching in the realm of ideas. The Ohio legislature has a legitimate interest in the prohibition of sabotage, violence, or unlawful methods of terrorism and its meaning is clear. It had no intention of eliminating the mere abstract teaching of the moral propriety or even the moral necessity for a resort to force or violence but *only teaching the duty to resort thereto.* The part of the statute prohibiting the assembly certainly is no broader in coverage than Section 2, (3) of the Smith Act which in *Dennis v. United States, supra,* was found constitutionally sound.

Appellee has no argument with the findings of this count in *Yates v. United States,* 354 U.S. 298, (1957), cited by appellant. These petitioners requested an instruction concerning the advocacy of abstract doctrine. This Court reaffirmed and clarified the decision in *Dennis.* In that decision the Court likened the Smith Act to *Gitlow v. New York,* 268 U.S. 652, (1925), and the New York Criminal Anarchy

Act upon which the Smith Act was patterned. In *Yates,* the Court, quoting from *Gitlow,* said at page 318:

> "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. . . . It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. . . . This [Manifesto] . . . is [in] the language of direct incitement. . . . That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of by force, violence and unlawful means, but action to that end, is clear. . . . That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear." Id. 268 US at 664-669. *Yates* 1, L. Ed. 2d, p. 1375.

The Court then concluded in *Yates* that the Smith Act was aimed at the advocacy and teaching of concrete action for the forcible overthrow of government, and not of principles divorced from action. The Smith Act was found to be constitutional; the case was reversed and remanded because of an error in a refusal to charge and lack of evidence.

The constitutionality of the Smith Act again was upheld in *Scales v. United States,* 367 U.S. 203, 228 (1961), particularly as it applied to the First Amendment. Then in a companion case, *Noto v. United States,* 367 U.S. 290 (1961), cited by appellant, the Court reversed on the ground that the evidence adduced at the trial was insufficient to sustain the conviction. And in *Bond v. Floyd,* 385 U.S. 116 (1966), the unanimous decision of this Court was based upon the fact that Bond's statements failed to demonstrate any incitement to violations of law.

Nor can that portion of the statute, part 4, dealing with assembly be attacked on the grounds of vagueness.

As said by this Court in *United States v. Cruickshank*, 92 U.S. 542, 522 (1875), cited by appellant: "The very idea of a government republican in form, implies a right on the part of its citizens to *meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.*" (Emphasis added).

The portion of the section applicable reads:

> "[no person shall] organize or help to organize or become a member of, or *voluntarily assemble with* any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism [the doctrine which advocates crime; sabotage; which is defined as the malicious injury or destruction of property of another; violence; or unlawful methods of terrorism as a means of accomplishing . . . political reform.]" (Emphasis added).

This description hardly can be described as one proscribing the right of any of the citizens of Ohio from meeting peaceably for any purpose.

Appellee believes that, except for the rearrangement of words, this section is identical with that of Section 2 (3) of the Smith Act with one significant difference. The Ohio statute provides that a violator must "voluntarily assemble with" whereas the Smith Act does not. Of course, the ultimate object of the assembly proscribed by the Smith Act is the overthrow or destruction of any government in the United States by force whereas that of the state statute is the accomplishment of political or industrial reform.

This section of the Smith Act has been found to be constitutional in *Dennis v. United States, supra; Yates v. United States, supra;* and *Scales v. United States, supra.* To be sure many convictions under the Smith Act have been reversed for the reason that an instruction to the jury was not sufficient as in *Yates,* or for the lack of an allegation and proof of specific interest as in *Noto.* And it may be

argued by appellant that the indictment here was not adequate to allege an intent but the indictment did allege that he "did unlawfully voluntarily assemble with a group or assemblage of persons found to advocate the doctrines of criminal syndicalism" (A. 2) which certainly indicates an intent upon his part, and the fact that he was the leader of the group assembled (A. 25-26) is indicative that he was not present as an innocent bystander.

The motion to quash the indictment was general in form and attacked the indictment on the basis that the statute upon which it was based was unconstitutional and further that the statute had been superseded by the Smith Act (A. 3). No clarification of the counts of the indictment nor request for a bill of particulars appear to have been made and denied. Nor was such a denial made the subject of a motion for a new trial (A. 5-6) as it should have been, if applicable.

Appellee, after considerable research finds only one other statute similar to the Ohio Criminal Syndicalism Statute here under attack. That is California's Criminal Syndicalism Act; Sections 11400 and 11401 California Penal Code. It is noted that subsections 1 and 4 of the California Act are practically identical to the subsections of the Ohio statute under attack. As in the Ohio statute, the California law prohibits certain acts as a means of accomplishing industrial or political change. The California Act was upheld in this Court, as not being repugnant to the First and Fourteenth Amendments to the Constitution in *Whitney v. California,* 274 U.S. 357 (1927). This Court held that the act was not unduly vague and uncertain as to its application. At page 368, the court stated:

> "It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition . . . The act, plainly, meets

the essential requirement of due process that a penal statute be 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties,' and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. Nash v. United States, 229 U.S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; Miller v. Strahl, 239 U.S. 426, 434, 60 L. ed. 364, 368, 36 Sup. Ct. Rep. 147. So, as applied here, the Syndicalism Act required of the defendant no 'prophetic' understanding of its meaning."

Then at page 371, it found:

"Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. Gitlow v. New York, 268 U.S. 652, 666-668, 69 L. ed. 1138, 1145, 1146, 45 Sup. Ct. Rep. 625, and cases cited.

"By enacting the provisions of the Syndicalism Act the state has declared through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the state, that these

acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute (Mugler v. Kansas, 123 U.S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273), and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the state in the public interest (Great Northern R. Co. v. Clara City, 246 U.S. 434, 439, 62 L. ed. 817, 819, 38 Sup. Ct. Rep. 346).

"The essence of the offense denounced by the act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See People v. Steelik, 187 Cal. 376, 203 Pac. 78. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state.

"We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clause of the 14th Amendment, on any of the grounds upon which its validity has been here challenged."

Mr. Justice Brandeis with whom Mr. Justice Holmes joined in a concerning opinion stated at page 373:

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless

speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

Then at page 378, he continued:

"But it [legislative declaration] does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied (Dahnke-Walker Mill Co. v. Bondurant, 257 U.S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106), the result of such an inquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the state, creates merely a rebuttable presumption that these conditions have been satisfied.

"Whether, in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the court that assembling with a political

party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the 14th Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed." 71 L. ed. U.S. 272-274.

As in *Whitney* apparently no contention was made in the trial court that the statute was void for the reason that there was no clear and present danger of serious evil, nor apparently did appellant contend at the trial that the existence of these conditions were necessary of proof thereby requiring the question of restricting the rights of free speech and assembly to be passed upon by the court or jury. As in *Whitney* there was evidence upon which the court or jury might have found that such danger existed.

This Court never has overruled by subsequent decision its decisions in *Dennis* or *Whitney* and none of the cases cited by appellant indicate that they have been overruled by implication.

The amicus has no argument with the decisions of this Court in the loyalty oath cases wherein the oaths required were so vague as to proscribe "guiltless knowing behavior" such as in *Cramp v. Board*, 368 U.S. 278 (1961), wherein the proscribed words were "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." There is no guilty knowing behavior described or proscribed here. *Bagget v. Bullitt*, 377 U.S. 360 (1964) is an example of an oath that did not

provide an ascertainable standard of conduct or one requiring more than a State may command. *Elfbrand v. Russell,* 384 U.S. 11 (1966) held that the statute was void in that it did not require a showing that an employee was an active member with the specific intent of assisting in achieving the unlawful ends of the proscribed organization. *Whitehill v. Elkins,* 389 U.S. 54 (1967) is another example of an oath assuring that one was not a member of a subversive organization when in fact he might not know the purposes of all of the organizations to which he belonged. In *Keyishan v. Board of Regents,* 385 U.S. 589 (1967), statutes that required or authorized the removal of faculty members for seditious utterances were unconstitutionally vague because a teacher could not know the extent to which the utterance must transcend mere statement about abstract doctrines of governmental overthrow in the abstract, made membership in the Communist Party prima facie evidence of disqualification and did not permit proof of non-active membership or absence of interest to further unlawful aims. At page 607, this Court stated:

> "Elfbrand and Aptheker [also cited by appellant] state the governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."

It is significant that although the section of the laws invalidated in Keyishan were held invalid "insofar as they proscribe mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party" the New York Penal Laws, Section 160 and 161, although referred to in the decision, were left intact.

II.

Section 2923.13 Ohio Revised Code Prohibiting Criminal Syndicalism Has Not Been Preempted By Federal Legislation.

It is exceedingly difficult to understand appellant's contention that federal law has preempted Section 2923.13 Ohio Revised Code prohibiting criminal syndicalism.

In support of his contention appellant cites the case of *Pennsylvania v. Nelson,* 350 U.S. 497 (1956). A careful review of that case indicates that the basis for its holding is that in enacting the Smith Act, the Congress preempted the right to prosecute Sedition against the United States. Mr. Chief Justice Warren delivered the opinion of the Court and enunciated tests of supersession.

> "*First,* [the] scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " Page 502.
>
> "*Second,* the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' " Page 504.
>
> "*Third,* enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program." Page 505.

Under the first rule the Court found the Pennsylvania Sedition Act, which specifically proscribed the crime of sedition against the government of "this state or of the United States," to be invalid in that Congress had intended to occupy the field of sedition.

Under the second rule the Court implied that Congress has determined that sedition *against the United States* is not a local offense. It is an offense against the nation.

Under the third rule the Court observed that the Federal Government had urged the states not to intervene with sedition against the United States.

But Chief Justice also stated at page 500:

> "It should be said at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. The distinction between the two situations was clearly recognized by the court below. Nor does it limit the jurisdiction of the States where the Constitution and Congress have specifically given them concurrent jurisdiction as was done under the Eighteenth Amendment and the Volstead Act. United States v. Lanza, 260 US 377, 67 L ed 314, 43 S Ct 141. Neither does it limit the right of the State to protect itself at any time against sabotage or attemped violence of all kinds."

An examinaion of the Ohio statute shows clearly that it does not offend any of the enunciated rules.

There is no reference to sedition, expressed or implied, in the Ohio Criminal Syndicalism Act which proscribes the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction or property of another; violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. There is nothing in this proscription which faintly suggests any application against interference with the federal government as specifically was done in the Pennsylvania law. All of the federal acts upon which the decision in *Pennsylvania v. Nelson, supra,* was based were aimed at the overthrow of government in the United States. The Ohio law does not presume to intrude into this area other than that political reform, by implication might be construed to amount to a complete overthrow of government. No such construction can be placed upon such verbiage which more appropriately envisage riots in connection with political rallies, interference with elections, illegal strike procedures and the like. It hardly can be argued

that the Congress has preempted the right to prosecute such practices, nor is it conceivable that the Congress ever would interfere with the States in their effort to maintain law and order within their respective boundaries. And this Court has so held. In *Uphaus v. Wyman,* 360 U.S. 72, (1959) at page 76, the Court, in referring to its decision in *Pennsylvania v. Nelson, supra,* stated:

> "... In Nelson itself we said that the 'precise holding of the court ... is that the Smith Act ... which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied). 350 U.S. at 499. The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made it clear that a State could proceed with prosecutions for sedition against the State itself; ... Nor did our opinion in Nelson hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.'" ...

In footnote 8 of the opinion it is pointed out:

> "... that the State had full power to deal with internal civil disturbances. Thus registration statutes, quo warranto proceedings as to subversive corporations, the subversive instigation of riots and a host of other subjects directly affecting the state security furnish grist for the State's legislative mill."

This is exactly what the Ohio Criminal Syndicalism Act was designed to do.

Nor can appellant contend that because the Ohio statute did not specifically limit its proscription to state activities it perforce included violations against the federal government. Section 1 of the New Hampshire Act, attacked in Uphaus, defines a subversive person: "'Subversive person'

means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of these, by force or violence; . . .' " Footnote 6. *Uphaus v. Wyman, supra.*

This negates completely appellant's argument that because Ohio specifically did not except offenses against the federal government, it was void. The New Hampshire Act which did include specifically such offenses, was not found to have been preempted in *Uphaus.*

CONCLUSION

Section 2923.13 Ohio Revised Code does not on its face or as authoritatively construed impose criminal sanctions in the exercise of the rights of free speech or peaceable assembly, is not vague or overbroad, nor has it been preempted by federal legislation. The amicus submits therefore that it is not unconstitutional.

Respectfully submitted,

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